



CRS Report for Congress

Lawsuits Against State Supporters of Terrorism: An Overview

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Summary

A 1996 amendment to the Foreign Sovereign Immunities Act (FSIA) enables American victims of international terrorist acts supported by certain States designated by the State Department as supporters of terrorism — Cuba, Iran, North Korea, Sudan, Syria, and previously Iraq and Libya — to bring suit in U.S. courts to seek monetary damages. Despite congressional efforts to make blocked (or “frozen”) assets of such States available for attachment by judgment creditors in such cases, plaintiffs encountered difficulties in enforcing the awards. Congress passed, as part of the National Defense Authorization Act for FY2008 (NDAA) (H.R. 1585), an amendment to the FSIA to provide a federal cause of action against terrorist States and to facilitate enforcement of judgments. After the President withheld approval of the NDAA based on the possible impact the measure would have on Iraqi assets, Congress passed a new version, P.L. 110-181 (H.R. 4986), which includes authority for the President to waive the FSIA provision with respect to Iraq. This report, which will be updated, provides an overview of these issues and relevant legislation (H.R. 5167). For more details, see CRS Report RL31258, *Suits Against Terrorist States by Victims of Terrorism*, by Jennifer K. Elsea.

In 1996, Congress amended the FSIA to allow civil suits by U.S. victims of terrorism against designated State sponsors of terrorism (DSST)¹ responsible for, or complicit in, such terrorist acts as torture, extrajudicial killing, aircraft sabotage, and hostage taking. 28 U.S.C. § 1605(a)(7). Congress also abrogated the immunity of foreign State assets under the FSIA to satisfy judgments awarded under the terrorism exception. 28 U.S.C. § 1610. After a court found that the abrogation of sovereign immunity did not itself create a cause of action, Congress passed the “Flatow Amendment,” 28 U.S.C. § 1605 note, to create a cause of action for such cases. Courts initially interpreted the statute as creating a cause of action against foreign States and their agencies and

¹ The list, established by the State Department, currently includes Cuba, Iran, North Korea, Sudan, and Syria. Iraq was removed from the list in 2004; Libya was removed in 2006. North Korea is scheduled to be removed from the list in August 2008.

instrumentalities, although its plain language referred only to officials, employees, and agents of such States. Numerous court judgments, generally rendered after the defendants' default, ensued, resulting in substantial awards to plaintiffs.

The nature of lawsuits against DSSTs changed significantly after the D.C. Circuit Court of Appeals held that neither the terrorism exception to the FSIA nor the Flatow Amendment created a private right of action against the foreign government itself, including its agencies and instrumentalities. Consequently, most plaintiffs asserted causes of action under domestic state laws, which resulted in some disparity in the relief available to victims injured due to similar or even the same acts of terrorism. Courts nevertheless continued to award sizable judgments against DSSTs and their officials, which now amount to more than \$18 billion in damages, most of which has been assessed against Iran. See CRS Report RL31258, *Suits Against Terrorist States by Victims of Terrorism*, by Jennifer K. Elsea.

Enforcement of Judgments Against Terrorist States

While winning judgments against terrorist States never posed insurmountable obstacles, enforcing those judgments has proven more arduous, primarily due to the scarcity of assets within U.S. jurisdiction that belong to States subject to economic sanctions and the immunity from attachment that assets frozen by sanctions regulations enjoy. Successive Administrations opposed allowing the use of frozen assets of foreign States to satisfy judgments out of concerns for treaty obligations to protect foreign diplomatic and consular properties, the desire to maintain the blocked assets for diplomatic leverage, and the concern that permitting the attachment of such assets would expose U.S. assets abroad to reciprocal action. Notwithstanding these objections, Congress has repeatedly stepped in to make more foreign assets available for judgment creditors, and appropriated some \$400 million to pay portions of certain judgments against Iran with the understanding that the President would seek to recover that amount from Iran. Consequently, some plaintiffs were able to collect portions of their judgments, while others were stymied. Some of the assets associated with DSSTs remained off-limits because they were not "blocked" within the meaning of the relevant statute; because plaintiffs had waived their right to attach the assets in question when they accepted payment from U.S. funds; because the assets were not subject to the exception to immunity or were exempted by presidential waiver; or because the United States validly possesses the property and successfully asserted U.S. sovereign immunity.

The National Defense Authorization Act for FY2008

In order to assist plaintiffs, Congress passed § 1083 of the National Defense Authorization Act for FY2008 (NDAA) (P.L. 110-181), to create § 1605A in title 28, U.S. Code. Section 1083 incorporates the terrorist State exception to the FSIA previously codified at 28 U.S.C. § 1605(a)(7), and a new cause of action against DSSTs to replace the Flatow Amendment. It allows U.S. nationals (and non-U.S. nationals working for the U.S. government overseas) who are harmed by terrorism to seek compensatory as well as punitive damages (which are not otherwise available against foreign States). The provision also seeks to make more assets associated with State sponsors of terrorism available for attachment in aid of execution of terrorism judgments, and to permit some plaintiffs to refile claims.

President Bush vetoed the original version of the NDAA, H.R. 1585, on the stated basis that the FSIA amendments would threaten Iraq's economic security. Congress responded with the new version, H.R. 4986, which authorizes the President to waive any provision of § 1083 with respect to Iraq. The President signed the bill and exercised the waiver authority. Section 1083 also encourages the President to negotiate a settlement of outstanding terrorism claims against Iraq. Pending cases have been permitted to go forward under the previous law, but it is unclear whether any Iraqi assets will remain available for attachment by judgment holders under other provisions of law.

New 28 U.S.C. § 1605A(g) provides for the establishment of a lien of *lis pendens* with respect to all real or tangible personal property within the judicial district that is subject to attachment in aid of execution and is titled in the name of a defendant State or any entities listed by the plaintiff as "controlled by" that State. Ordinarily, *lis pendens* in civil litigation is used to put third parties on notice that the property is the subject of litigation, which effectively prevents the alienation of such property, although the notice is not technically a lien. Under the new provision, the clerk of the district court is required to file the notice of action indexed by listing the defendant and its controlled entities. This may relieve plaintiffs of the burden of identifying specific property in the notices, but it is unclear what further measures might be required to ensure adequate notice is afforded to prospective purchasers under the procedure or how it is to be determined without further process that the property is in fact subject to attachment. In the case of State sponsors of terror, whose property for the most part is already subject to substantial limitations on transactions, the primary utility may be the establishment of a line of priority among lien-holders. However, in the case of States that are no longer subject to terrorism sanctions, such as Libya, the provision could have some impact on lawful transactions.

New 28 U.S.C. § 1610(g) provides that the property of a foreign State against which a judgment has been entered under § 1605A (or predecessor provision), or of an agency or instrumentality of such a foreign State, "including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity," is subject to attachment in aid of execution and execution upon that judgment, regardless of how much economic control over that property the foreign government exercises and whether the government derives profits or benefits from it. The President has no waiver authority (except with respect to Iraq). The provision may enable a plaintiff to "pierce the corporate veil" of a corporation owned, in whole or in part, by a judgment debtor State without having to demonstrate to the court that the presumption of independent status should be overridden. It could also be read as an effort to make any entity in which the defendant State (including its separate agencies and instrumentalities) has any interest liable for the terrorism-related judgments awarded against that State. On the other hand, § 1610(g) states that nothing in it is to be construed as superceding the court's authority to protect the interests of a person "who is not liable in the action giving rise to a judgment."

Section 1610(g) also makes a property that is regulated by reason of U.S. sanctions available to satisfy terrorism judgments. It does not explicitly waive U.S. sovereign immunity, but appears designed to defeat provisions in the sanctions regulations that make blocked property effectively immune from court action. In this respect, it echoes language in § 1610(f)(1) (which is not in effect because it was waived by President Clinton), except that § 1610(g) applies only to *regulated* property rather than property that

is *blocked or regulated* pursuant to sanctions regimes,² and it would not be subject to the presidential waiver in § 1620(f)(3). Unlike § 201 of TRIA (28 U.S.C. § 1610 note), the new language applies to *regulated* rather than *blocked* assets and it allows assets to be attached in aid of enforcing punitive damages.

The new provisions apply to any claim arising under them as well as to any action brought under former 28 U.S.C. § 1605(a)(7) or the Flatow Amendment that “relied on either of these provisions as creating a cause of action” and that “has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state,” and that is still before the courts “in any form,” including appeal or motion for post-judgment relief. In cases brought under the older provisions, the federal court in which the claim originated is required, on motion by the plaintiffs within 60 days after enactment, to treat the case as if it had been brought under the new provisions, apparently to include reinstating a vacated judgment. The measure waives a defendant’s “defenses of *res judicata*, collateral estoppel and limitation period” in any reinstated action. The provision also permits the filing of new cases involving incidents that are already the subject of a timely-filed terrorism action under the FSIA, notwithstanding the limitation time for filing, so long as the related action is filed within 60 days after enactment (January 28, 2008) or entry of judgment in the original action. Several actions have been filed under this provision, including some lawsuits by plaintiffs who have already won significant judgments under the previous law.

While § 1083(c) refers to “pending cases,” it appears to cover finally adjudicated cases in which litigants have filed a motion for relief from final judgment after appeals are exhausted. To the extent the provision is read to require courts to reopen final judgments or reinstate vacated judgments, it may be vulnerable to invalidation as an improper exercise of judicial powers by Congress.³ A similar objection may be raised regarding the waiver of legal defenses: while it seems well-established that Congress can waive defenses in actions against the United States, an effort to abrogate legal defenses of other parties could raise constitutional due process and separation of powers issues. It may be that no cases qualify for reopening under this provision because the plaintiffs would have had to have filed a motion prior to the enactment of P.L. 110-181. However, if previous lawsuits can be filed again as “related actions” under § 1083(c)(3), then plaintiffs who file prior to the deadline can bring new actions regardless of the reason their original case was unsuccessful or perhaps even if their case yielded an award. It is unclear whether such lawsuits would count as “refiled actions” for the purpose of abrogating the defendant’s legal defenses under § 1803(c)(2)(B).

² TRIA § 201(d)(2) defines “blocked asset” to mean property seized or frozen pursuant to certain sanctions, but not property that may be transferred pursuant to a license that is required by statute *other than* the International Emergency Economic Powers Act (IEEPA) or the United Nations Participation Act of 1945. It also excludes diplomatic or consular property being used solely for diplomatic or consular purposes from the definition of “blocked asset.” TRIA does not refer to regulated assets, so it is unclear whether “blocked” and “regulated” are mutually exclusive terms, or whether “blocked” assets would be considered to be “regulated” as well. Assets regulated pursuant to IEEPA presumably mean those that are licensed for transfer.

³ See *Plaut v. Spendthrift Farms*, 514 U.S. 211 (1995).

The new federal cause of action may make judgments against DSSTs heftier and easier to obtain, but whether such judgments will be easier to enforce seems less certain. The result may be an increase in debts owed by those States without a sufficient increase in assets available to cover them, which could amplify competition among plaintiffs and lead to calls for further congressional action. Transactions with debtor States are likely to increase only with respect to States that are no longer subject to anti-terrorism sanctions, in which case the use of their assets to satisfy judgments may act as a barrier to trade despite the lifting of sanctions. The presidential waiver for Iraq permits the President to protect Iraqi assets from attachment to satisfy any outstanding judgments. H.R. 5167 has been introduced in the House to repeal the presidential waiver provision.

Effect of the Waiver of § 1083 on Cases Pending Against Iraq

Section 1083(d) authorizes the President to waive any provision of §1083 with respect to Iraq if he determines that a waiver serves U.S. national security interests and promotes U.S.-Iraq relations, the waiver will promote reconstruction and political development in Iraq, and Iraq continues to be a reliable ally and partner in combating terrorism. The waiver applies retroactively regardless of its effect on pending cases.

On the day the President signed the FY2008 NDAA into law, the White House signed a waiver,⁴ apparently foreclosing any refiling of the lawsuit by former prisoners of war against Iraq and Saddam Hussein for their mistreatment during the first Gulf War.⁵ However, pending claims against Iraq under the FSIA terrorism exception (as previously in force) have been permitted to go forward.⁶ Final judgments against Iraq are not affected, but will remain difficult to enforce. Iraqi government assets used for commercial purposes in the United States that are not subject to the protection of E.O. 13303, which covers the Development Fund for Iraq and all interests associated with Iraqi petroleum and petroleum products, may be subject to attachment and execution on terrorism judgments against Iraq under 28 U.S.C. § 1610. The President could, however, issue another executive order to protect all Iraqi assets from attachment to satisfy judgments.

Administration Proposal to Waive § 1083 for Libya

U.S. businesses seeking to establish a commercial relationship with Libya have expressed concern that § 1083 will harm U.S.-Libya trade.⁷ The Bush Administration, which has touted renewed U.S. investment in Libya and growth in bilateral trade as beneficial to the U.S. economy and as important tools for reestablishing relations with a reformed state sponsor of terrorism, appears to share their view. Plaintiffs with open

⁴ Presidential Determination No. 2008-9 of January 28, 2008, Waiver of Section 1083 of the National Defense Authorization Act for Fiscal Year 2008, 73 Fed. Reg. 6,571 (2008) (waiving all provisions of § 1083 with respect to Iraq).

⁵ *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1010 (2005).

⁶ *Simon v. Iraq*, 2008 WL 2497417 (D.C. Cir. 2008).

⁷ Correspondence from the U.S.-Libya Business Association, the National Foreign Trade Council, the National Association of Manufacturers, and the United States Chamber of Commerce to U.S. Secretary of State Condoleezza Rice, February 28, 2008 (urging the Administration to seek waiver authority with respect to Libya). For more information about U.S.-Libya relations, see CRS Report RL33142, *Libya: Background and U.S. Relations*, by Christopher M. Blanchard.

cases and final judgments against Libya appear to take the view that any detriment to U.S.-Libya trade would be a useful means of pressuring the Libyan government into compensating victims of its terrorist activities.⁸

Section 1083 could have an adverse effect on U.S. trade with Libya because of its previous designation as a state sponsor of terrorism. Nearly \$1.7 billion has been awarded against Libya, with an additional \$5.3 billion awarded against certain named Libyan officials, and some 20 additional cases are pending. While new lawsuits are barred six months after a State's terrorist designation has been rescinded, new cases based on a terrorist act that is or was already the subject of a lawsuit under the prior terrorism exception to the FSIA were permitted up to March 28, 2008, and may be filed within 60 days of the date of entry of judgment in the original lawsuit. Accordingly, Libya remains subject to lawsuits based on acts of terrorism that occurred while it was designated a State sponsor of terrorism until 60 days after the entry of final judgment in pending cases.

New § 28 U.S.C. § 1610(g) could make commercial transactions more difficult if plaintiffs file liens of *lis pendens* or seek to attach Libyan assets. Judgment holders will likely seek to attach goods purchased by Libya as well as financial instruments used to pay for goods or services or to secure contract performance. If judgment holders succeed in seizing property or debts in the possession of a U.S. company, Libya could seek to hold the company liable for breach of contract for failing to make payment or delivery, or it could seek to justify its own breach or early termination of a contract, which could also result in losses to the U.S. company involved. While it seems likely that a U.S. court would not find the U.S. company in breach of contract for having submitted to a judicial order, the contract in question may call for disputes to be resolved according to foreign law or in a foreign forum or through international arbitration, in which case the outcome is less certain. If Libya chooses not to open accounts or establish standby letters of credit in financial institutions subject to U.S. jurisdiction, U.S.-Libya trade could become more difficult and riskier for the U.S. companies involved, or Libya may avoid risk by choosing business partners outside the United States.

The Administration proposes amending FY2008 NDAA § 1083 to include a new waiver provision to permit an exception with respect to all states whose designation as sponsors of terrorism has been rescinded if the President determines that the waiver is in the national security interest of the United States.⁹ The Administration's proposal does not include a requirement similar to the Iraq waiver that the President determine that the former state sponsor of terrorism is a U.S. ally in the fight against terrorism or that democracy will be promoted. The temporal scope of the proposed waiver authority is identical to the Iraq waiver provision in § 1083(d)(2), and the congressional notification requirement is the same, as is the sense of the Congress that the Administration should work with governments for whom a waiver is executed to settle meritorious claims against them. If Congress amends § 1083 as proposed and the President executes a waiver, pending lawsuits could probably continue, but judgments may be more difficult or impossible to enforce.

⁸ See Eric Lipton, *Libya Seeks Exemption for Its Debt to Victims*, N.Y. TIMES, April 22, 2008.

⁹ Text of the Administration proposal was included in the correspondence from U.S. Secretary of State Condoleezza Rice, U.S. Secretary of Defense Robert Gates, U.S. Secretary of Energy Samuel Bodman, and U.S. Secretary of Commerce Carlos Gutierrez to Speaker of the House Nancy Pelosi, Senate Majority Leader Harry Reid, et al., March 18, 2008.